In the Supreme Court of the United States.

OCTOBER TERM, 1900.

FRANK M. FAIRBANK, PLAINTIFF in error, v. THE UNITED STATES. } No. 226.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

I.

In connection with the quotation from the letter of Mr. Luther Martin to the legislature of Maryland, quoted in my brief, page 15, I call the court's attention to the fact that the so-called "New Jersey plan" submitted by Mr. Patterson authorized Congress to raise revenue, among other ways, "*by stamps on paper, vellum, or parchment.*" (5 Elliott's Debates, p. 191.)

Mr. Martin's statement in his letter, which I have quoted, evidently grew out of his inquiry on August 16, thus reported in 5 Elliott's Debates, page 432:

> Mr. L. MARTIN asked what was meant by the committee of detail in the expression "*duties*" and

"*imposts*." If the meaning were the same, the former was unnecessary; if different, the matter ought to be made clear.

Mr. WILSON. *Duties* are applicable to many objects to which the word *imposts* does not relate. The latter are appropriated to commerce; the former extends to a variety of objects, *as stamp duties*, etc.

II.

In order to lighten the labor of the court, in case it should deem it desirable to go into the history of the adoption of the clause providing that "No tax or duty shall be laid on articles exported from any State," I print below extracts from the fifth volume of Elliott's Debates on the Constitution.

The Virginia plan, laid before the convention by Mr. Charles Pinckney (on May 29), contained the following provision (5 Ell. Deb., p. 130):

> No tax shall be laid on articles exported from the States; nor capitation tax, but in proportion to the census before directed.

In discussing his proposition "that taxation shall be in proportion to representation," Mr. GOUVERNEUR MORRIS (on July 12) said (id., p. 302):

> Mr. GOUVERNEUR MORRIS admitted that some objections lay against his motion, but supposed they would be removed by restraining the rule to *direct* taxation. With regard to indirect taxes on *exports* and imports, and on consumption, the rule would be inapplicable.
>
> General PINCKNEY. He was alarmed at what was said (by Mr. Gouverneur Morris) yesterday concern-

ing the negroes. He was now again alarmed at what had been thrown out concerning the taxing of exports. South Carolina has, in one year, exported to the amount of £600,000 sterling, all of which was the fruit of the labor of her blacks. Will she be represented in proportion to this amount? She will not. Neither ought she then to be subject to a tax on it. He hoped a clause would be inserted in the system, restraining the legislature from taxing exports.

On July 23 General Pinckney used the following language (id., p. 357):

> General PINCKNEY reminded the convention that, if the committee should fail to insert some security to the Southern States against an emancipation of slaves, and taxes on exports, he should be bound by duty to his State to vote against their report.

The report of the Committee of Detail, submitted August 6, contained the following provision (id., p. 379):

> Art. VII, sec. 4. No tax or duty shall be laid by the legislature on articles exported from any State; nor on the migration or importation of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited.

On August 8, in discussing the basis of representation, Mr. GOUVERNEUR MORRIS said (id., p. 393):

> The legislature will have indefinite power to tax them (the Northern States) by excises and duties on imports, both of which will fall heavier on them than on the Southern inhabitants; for the bohea tea used by a Northern freeman will pay more tax than the whole consumption of the miserable slave, which consists of nothing more than his physical subsistence and the rag that covers his nakedness. On

the other side, the Southern States are not to be restrained from importing fresh supplies of wretched Africans, at once to increase the danger of attack and the difficulty of defense; nay, they are to be encouraged to it, by an assurance of having their votes in the National Government increased in proportion; and are, at the same time, to have their exports and their slaves exempt from all contributions for the public service.

In discussing the general power of taxation conferred by the Constitution, the following discussion took place on August 16 (id., pp. 432, 433):

Mr. MASON urged the necessity of connecting with the powers levying taxes, duties, etc., the prohibition in article 6, section 4, "that no tax shall be laid on exports." He was unwilling to trust to its being done in a future article. He hoped the Northern States did not mean to deny the Southern this security. It would hereafter be as desirable to the former, when the latter should become the most populous. *He professed his jealousy for the productions of the Southern, or, as he called them, the staple States.* He moved to insert the following amendment:

"*Provided*, That no tax, duty, or imposition, shall be laid by the Legislature of the United States on articles exported from any State."

Mr. SHERMAN had no objection to the proviso here, other than that it would derange the parts of the report, as made by the committee, to take them in such order.

Mr. RUTLEDGE. It being of no consequence in what order points are decided, he should vote for the clause as it stood, but on condition that the subsequent part relating to negroes should also be agreed to.

24205

Mr. GOUVERNEUR MORRIS considered such a proviso as inadmissible anywhere. It was so radically objectionable that it might cost the whole system the support of some members. He contended that it would not in some cases be equitable to tax imports without taxing exports; and that taxes on exports would be often the most easy and proper of the two.

Mr. MADISON. First, the power of laying taxes on exports is proper in itself; and, as the States can not with propriety exercise it separately, it ought to be vested in them collectively. Secondly, it might with particular advantage be exercised with regard to articles in which America was not rivalled in foreign markets, as tobacco, etc.; the contract between the French farmers-general and Mr. Morris, stipulating that if taxes should be laid in America on the export of tobacco they should be paid by the farmers, showed that it was understood by them that the price would be thereby raised in America, and consequently the taxes be paid by the European consumer. Thirdly, it would be unjust to the States whose produce was exported by their neighbors, to leave it subject to be taxed by the latter. This was a grievance which had already filled New Hampshire, Connecticut, New Jersey, Delaware, and North Carolina, with loud complaints, as it related to imports, and they would be equally authorized by taxes by the States on exports. Fourthly, the Southern States, being most in danger and most needing naval protection, could the less complain if the burden should be somewhat heaviest on them. And, finally, we are not providing for the present moment only; and time will equalize the situation of the States in this matter. He was, for these reasons, against the motion.

Mr. WILLIAMSON considered the clause proposed, against taxes on exports, as reasonable and necessary.

Mr. ELLSWORTH was against taxing exports, but thought the prohibition stood in the most proper place, and was against deranging the order reported by the committee.

Mr. WILSON was decidedly against prohibiting general taxes on exports. He dwelt on the injustice and impolicy of leaving New Jersey, Connecticut, etc., any longer subject to the exactions of their commercial neighbors.

Mr. GERRY thought the legislature could not be trusted with such a power. It might ruin the country. *It might be exercised partially, raising one and depressing another part of it.*

Mr. GOUVERNEUR MORRIS. However the legislative power may be formed, it will, if disposed, be able to ruin the country. He considered the taxing of exports to be in many cases highly politic. Virginia has found her account in taxing tobacco. All countries having peculiar articles tax the exportation of them, as France her wines and brandies. A tax here on lumber would fall on the West Indies, and punish their restrictions on our trade. The same is true of live stock, and, in some degree, of flour. In case of a dearth in the West Indies, we may extort what we please. Taxes on exports are a necessary source of revenue. For a long time the people of America will not have money to pay direct taxes. Seize and sell their effects, and you punish them into revolts.

Mr. MERCER was strenuous against giving Congress power to tax exports. Such taxes are impolitic, as encouraging the raising of articles not meant for exportation. The States had now a right, where their situation permitted, to tax both the imports

24253

and the exports of their uncommercial neighbors. It was enough for them to sacrifice one-half of it. It had been said, the Southern States had most need of naval protection. The reverse was the case. Were it not for promoting the carrying trade of the Northern States, the Southern States could let the trade go into foreign bottoms, where it would not need our protection. Virginia, by taxing her tobacco, had given an advantage to that of Maryland.

Mr. SHERMAN. To examine and compare the States, in relation to imports and exports, will be opening a boundless field. He thought the matter had been adjusted, and that imports were to be subject, and exports not, to be taxed. He thought it wrong to tax exports, except it might be such articles as ought not to be exported. *The complexity of the business in America would render an equal tax on exports impracticable.* The oppression of the uncommercial States was guarded against by the power to regulate trade between the States. As to compelling foreigners, that might be done by regulating trade in general. The Government would not be trusted with such a power. Objections are most likely to be excited by considerations relating to taxes and money. A power to tax exports would shipwreck the whole.

Concerning the suggested prohibition against the States taxing exports as well as imports, the following was said on August 21 (id., pp. 454, 455, 456):

Mr. LANGDON. By this section the States are left at liberty to tax exports. New Hampshire, therefore, with other nonexporting States, will be subject to be taxed by the States exporting its produce. This could not be admitted. It seems to be feared that the Northern States will oppress the trade of the

Southern. This may be guarded against, by requiring the concurrence of two-thirds or three-fourths of the legislature in such cases.

Mr. ELLSWORTH. It is best as it stands. The power of regulating trade between the States will protect them against each other. Should this not be the case, the attempts of one to tax the produce of another passing through its hands, will force a direct exportation and defeat themselves. *There are solid reasons against Congress taxing exports. First, it will discourage industry, as taxes on imports discourage luxury. Secondly, the produce of different States is such as to prevent uniformity in such taxes. There are indeed but a few articles that could be taxed at all, as tobacco, rice, and indigo; and a tax on these alone would be partial and unjust. Thirdly, the taxing of exports would engender incurable jealousies.*

Mr. WILLIAMSON. Though North Carolina has been taxed by Virginia, by a duty on 12,000 hogsheads of her tobacco through Virginia, yet he would never agree to this power. Should it take place, it would destroy the last hope of the adoption of the plan.

Mr. GOUVERNEUR MORRIS. These local considerations ought not to impede the general interest. There is great weight in the argument, that the exporting States will tax the produce of their uncommercial neighbors. The power of regulating the trade between Pennsylvania and New Jersey will never prevent the former from taxing the latter: nor will such a tax force a direct exportation from New Jersey. The advantages possessed by a large trading city outweigh the disadvantage of a moderate duty, and will retain the trade in that channel. If no tax can be laid on exports, an embargo can not be laid, though in time of war such a measure

may be of critical importance. Tobacco, lumber, and live stock are three objects belonging to different States of which great advantage might be made by a power to tax exports. To these may be added ginseng and masts for ships, by which a tax might be thrown on other nations. The idea of supplying the West Indies with lumber from Nova Scotia is one of the many follies of Lord Sheffield's pamphlet. The state of the country, also, will change, and render duties on exports—as skins, beaver, and other peculiar raw materials—politic in the view of encouraging American manufactures.

Mr. BUTLER was strenuously opposed to a power over exports, as unjust and alarming to the staple States.

Mr. LANGDON suggested a prohibition on the States from taxing the produce of other States exported from their harbors.

Mr. DICKINSON. The power of taxing exports may be inconvenient at present; but it must be of dangerous consequence to prohibit it with respect to all articles, and forever.. He thought it would be better to except particular articles from the power.

Mr. SHERMAN. It is best to prohibit the national legislature in all cases. The States will never give up all power over trade. An enumeration of particular articles would be difficult, invidious, and improper.

Mr. MADISON. As we ought to be governed by national and permanent views, it is a sufficient argument for giving the power over exports, that a tax, though it may not be expedient at present, may be so hereafter. A proper regulation of exports may, and probably will, be necessary hereafter, and for the same purposes as the regulation of imports, viz. for revenue, domestic manufactures, and procuring

equitable regulations from other nations. An embargo may be of absolute necessity, and can alone be effectuated by the general authority. The regulation of trade between State and State can not effect more than indirectly to hinder a State from taxing its own exports, by authorizing its citizens to carry their commodities freely into a neighboring State, which might decline taxing exports, in order to draw into its channel the trade of its neighbors. As to the fear of disproportionate burdens in the mere exporting States, it might be remarked that it was agreed, on all hands, that the revenue would principally be drawn from trade, and as only a given revenue would be needed, it was not material whether all should be drawn wholly from imports, or half from those and half from exports. The imports and exports must be pretty nearly equal in every State, and, relatively, the same among the different States.

Mr. ELLSWORTH did not conceive an embargo by the Congress interdicted by this section.

Mr. M'HENRY conceived that power to be included in the power of war.

Mr. WILSON. Pennsylvania exports the produce of Maryland, New Jersey, Delaware, and will, by and by, when the river Delaware is opened, export for New York. In favoring the general power over exports, therefore, he opposed the particular interest of his State. He remarked that the power had been attacked by reasoning which could only have held good in case the General Government had been *compelled*, instead of *authorized*, to lay duties on exports. To deny this power is to take from the common Government half the regulation of trade. It was his opinion that a power over exports might be more effectual than that over imports in obtaining beneficial treaties of commerce.

24255

Mr. GERRY was strenuously opposed to the power over exports. It might be made use of to compel the States to comply with the will of the General Government, and to grant it any new powers which might be demanded. We have given it more power already than we know how will be exercised. It will enable the General Government to oppress the States, as much as Ireland is oppressed by Great Britain.

Mr. FITZSIMONS would be against a tax on exports to be laid immediately, but was for giving a power of laying the tax when a proper time may call for it. This would certainly be the case when America should become a manufacturing country. He illustrated his argument by the duties in Great Britain on wool, etc.

Colonel MASON. If he were for reducing the States to mere corporations, as seemed to be the tendency of some arguments, he should be for subjecting their exports as well as imports to a power of general taxation. He went on a principle often advanced, and in which he concurred, that a majority, when interested, will oppress the minority. This maxim has been verified by our own legislature (of Virginia). If we compare the States in this point of view the eight Northern States have an interest different from the five Southern States; and have, in one branch of the Legislature, thirty-six votes against twenty-nine, and in the other in the proportion of eight against five. The Southern States had, therefore, ground for their suspicions. *The case of exports was not the same with that of imports. The latter were the same throughout the States; the former very different. As to tobacco, other nations do raise it, and are capable of raising it, as well as Virginia, etc. The impolicy of taxing that article had been demonstrated by the experiment of Virginia.*

> Mr. CLYMER remarked that *every State might reason with regard to its particular productions in the same manner as the Southern States. The Middle States may apprehend an oppression of their wheat, flour, provisions, etc.; and with more reason, as these articles were exposed to a competition in foreign markets not incident to tobacco, rice, etc.* They may apprehend also combinations against them between the Eastern and Southern States, as much as the latter can apprehend them between the Eastern and Middle. He moved, as a qualification of the power of taxing exports, that it should be restrained to regulations of trade, by inserting after the word "duty," article 7, section 4, the words "for the purpose of revenue."

The next day (August 22) the discussion of this section was resumed. It was urged that Congress should be authorized to lay a tax upon slaves imported into this country. The portion of the section relative to the importation of slaves was finally recommitted, this action being preceded by the following (id., p. 460):

> Mr. GOUVERNEUR MORRIS wished the whole subject to be committed, including the clauses relating to taxes on exports and to a navigation act. *These things may form a bargain among the Northern and Southern States.*
>
> Mr. BUTLER declared that he would never agree to the power of taxing exports.

The clause prohibiting the States from taxing imports came before the convention again on August 28, and was amended by including within the prohibition exports as well as imports (id., p. 486). At this time the limitation was added after the word "exports," that the tax,

when levied with the consent of Congress, should be for the use of the United States.

This clause again came before the convention on September 12 (id., p. 538):

> The clause relating to exports being reconsidered, at the instance of Colonel Mason, who urged that the restrictions on the States would prevent the incidental duties necessary for the inspection and safekeeping of their produce, and be ruinous to the staple States, as he called the five Southern States, he moved as follows:
>
> "Provided, nothing herein contained shall be construed to restrain any State from laying duties upon exports for the sole purpose of defraying the charges of inspecting, packing, storing, and indemnifying the losses in keeping the commodities in the care of public officers before exportation."
>
> In answer to a remark which he anticipated, to wit, that the States could provide for these expenses by a tax in some other way, he stated the inconvenience of requiring the planters to pay a tax before the actual delivery for exportation.
>
> Mr. MADISON seconded the motion. It would at least be harmless, and might have the good effect of restraining the States to *bona fide* duties for the purpose, as well as of authorizing explicitly such duties; though, perhaps, the best guard against an abuse of the power of the States on this subject was the right in the General Government to regulate trade between State and State.
>
> Mr. GOUVERNEUR MORRIS saw no objection to the motion. He did not consider the dollar per hogshead laid on tobacco in Virginia as a duty on exportation, as no drawback would be allowed on tobacco taken out of the warehouse for internal consumption.

The last action on this clause was taken on September 14 (id., p. 545):

> At the end of the clause, "no tax or duty shall be laid on articles exported from any State," was added the following amendment, conformably to a vote on the 31st of August (p. 502), viz:
>
> "No preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another."

III.

In the case of *Aguirre* v. *Maxwell* (3 Blatchford, 140) the validity of an extra tonnage duty, levied upon a cargo exported from New York to Cuba in a Spanish vessel, was sustained in the face of a protest that such duty amounted to a tax or duty on articles exported from a State. The court said:

> The provision of the Constitution (article 1, section 9) that "no tax or duty shall be laid on articles exported from any State," does not apply to the imposition of taxes on foreign vessels. It is within the discretion of Congress to totally inhibit the import or export trade in foreign vessels to or from our ports, or to grant them the privilege of bringing in or carrying out cargoes on such conditions and under such restrictions as may be regarded as most beneficial to the United States. * * * As the power exists, to impose the duty on vessels, the method of determining the amount, whether to be measured by the rate of taxation the cargo would be subjected to, if coming from Cuba or Porto Rico, or by the value of the ship or cargo, in gross or on

> a ratio estimated, as with domestic vessels, by the capacity of the vessel alone, is at the discretion of Congress.

In the case of *Nathan* v. *Louisiana* (8 Howard, 73), a State tax imposed on a broker dealing exclusively in foreign bills of exchange was held not void for repugnance to the constitutional power of Congress to regulate commerce. The court, speaking by Mr. Justice McLean, said (p. 81):

> No State can tax an export or an import as such, except under the limitations of the Constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the State, it is a subject of taxation by the State. A cotton broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation.
>
> A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail. It is a note merely ordering the payment of money, which may be negotiated by indorsement, and the liability of the names that are on it depends upon certain acts to be done by the holder when it becomes payable.

Again, page 82:

> For the purposes of revenue, the Federal Government has taxed bills of exchange, foreign and domestic, and promissory notes, whether issued by individuals or banks. Now the Federal Government can no more regulate the commerce of a State than a State can regulate the commerce of the Federal Government; and domestic bills or promissory notes are as necessary to the commerce of a State as foreign bills to the commerce of the Union. And

if a tax on an exchange broker, who deals in foreign bills, be a regulation of foreign commerce, or commerce among the States, much more would a tax upon State paper, by Congress, be a tax on the commerce of a State.

JOHN K. RICHARDS,
Solicitor-General.

DECEMBER 18, 1900.

O